

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEVE GOLDRING
Claimant

VS.

K-MART CORPORATION
Respondent,
Self-Insured

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Docket No. 245,072

ORDER

Respondent appealed the June 8, 2000 Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on December 13, 2000.

APPEARANCES

Chris Miller of Lawrence, Kansas, appeared for claimant. Matthew J. Thiesing of Lenexa, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for an April 5, 1999 accident and alleged injuries to the right shoulder and mid back. In the June 8, 2000 Award, Judge Avery found that claimant sustained permanent injury to his mid back and, therefore, granted claimant permanent partial disability benefits for a four percent whole body functional impairment.

Respondent contends Judge Avery erred. Respondent argues that any injuries that claimant sustained in the April 1999 accident have completely resolved and, therefore, claimant should not receive any permanent partial disability benefits. Additionally, respondent argues that claimant has failed to prove that he injured his back in the accident and, therefore, claimant should not receive any benefits for that alleged injury.

Conversely, claimant argues that (1) he should be granted permanent partial general disability benefits for either a four or five percent whole body functional impairment, (2) the Judge should have ordered the respondent to pay the medical bills incurred with both Doctors Mirtz and Warner as authorized medical expense, and (3) the Judge should not have admitted or considered the videotapes of claimant playing softball that respondent offered into evidence.

The issues before the Board on this review are:

1. What is the nature and extent of claimant's injury and disability?
2. Should the medical expense that claimant incurred with chiropractors Timothy Mirtz and Robert W. Warner be treated as authorized medical expense?
3. Should videotapes that were taken of claimant while playing softball be admitted into the evidentiary record?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. After reviewing the entire record and considering the parties' arguments, the Board finds and concludes that the Award should be affirmed. The Board adopts as its own the findings and conclusions set forth in the Award.

2. The Board affirms the Judge's finding that claimant now has a four percent whole body functional impairment as a result of the work-related injury that he sustained on April 5, 1999, while working for respondent operating a pallet jack. The Board is persuaded by the testimony from both claimant's supervisor, Dirk Munsey, who testified that after the accident claimant was complaining of shoulder and upper back pain, and the testimony of Dr. Dale E. Darnell, the orthopedic surgeon who examined and evaluated claimant at the Judge's request. According to Dr. Darnell, claimant has a four percent whole body functional impairment due to an injury to the thoracic spine. The doctor testified that, contrary to respondent's contentions, claimant's back symptoms following the April 1999 accident were always in the area of the lower thoracic spine¹ and that the thoracic spine injury was probably caused by that accident. Dr. Darnell testified, in part:

For lack of any better information, I would say that my records are pretty clear. He [claimant] was okay until the 5th of April. Now he's got trouble. I would have to say that that's the cause of his trouble. I don't know if softball aggravated him or not. It didn't look it to me.²

¹ Deposition of Dale E. Darnell, M.D., April 17, 2000; p. 12.

² Deposition of Dale E. Darnell, M.D., April 17, 2000; p. 14.

In concluding that claimant injured his thoracic spine in the April 1999 accident, the Board was also persuaded by claimant's testimony that he felt a pop in his mid back at the time of the incident.

The Board is mindful that Dr. Robert W. Warner and Dr. Michael Geist, both of whom treated claimant, testified that claimant had a five percent whole body functional impairment and a zero percent whole body functional impairment, respectively. But the Board is persuaded that Dr. Darnell's opinion is the most unbiased and the most credible. Therefore, the Board adopts Dr. Darnell's functional impairment opinion as its finding.

3. Claimant requests the Board to order respondent to pay the medical expenses incurred with both Doctors Mirtz and Warner because respondent allegedly refused or neglected to provide medical treatment. K.S.A. 1998 Supp. 44-510 provides, in part:

If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this section, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director.

But the Board finds and concludes that claimant failed to prove that respondent either refused or neglected to reasonably provide him medical treatment. Therefore, the medical expense incurred with both Doctors Mirtz and Warner for treatment, as opposed to any expense incurred for obtaining an impairment rating, shall be paid by respondent up to the \$500 statutory maximum for unauthorized medical expense.³

4. Claimant objected to respondent entering videotapes into the evidentiary record that showed claimant playing softball. Claimant objected to the tapes on the basis that the tapes were allegedly incomplete and, therefore, did not show the difficulties that he was experiencing with his back while playing ball. Claimant contends the videotapes were either recorded or edited in such a manner that any activities that demonstrated difficulties with his back were deleted.

The Board concludes that the videotapes should be admitted as claimant's objections go to the weight that the tapes should be given rather than to their admissibility.

5. In both its brief and in its argument to the Board, respondent accused claimant of being a liar and a perjurer. But the Board finds that a careful review of the record indicates that claimant was truthful and credible. Respondent's accusations are without merit.

³ See K.S.A. 1998 Supp. 44-510(c)(2).

AWARD

WHEREFORE, the Board affirms the June 8, 2000 Award entered by Judge Avery.

IT IS SO ORDERED.

Dated this ____ day of January 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Lawrence, KS
Matthew J. Thiesing, Lenexa, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director